NO. 10-16696

ARGUED DECEMBER 6, 2010
(CIRCUIT JUDGES STEPHEN REINHARDT, MICHAEL HAWKINS, & N.R. SMITH)

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KRISTIN PERRY, et al.,
Plaintiffs-Appellees,

v.

EDMUND G. BROWN, Jr., et al.,
Defendants,

and

DENNIS HOLLINGSWORTH, et al.,
Defendant-Intervenors-Appellants.

On Appeal from United States District Court for the Northern District of California
Civil Case No. 09-CV-2292 JW (Honorable James Ware)

REPLY ON APPELLANTS' MOTION FOR ORDER COMPELLING RETURN OF TRIAL RECORDINGS AND OPPOSITION TO APPELLEES' MOTION TO UNSEAL

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ARGUMENT

The video recordings of the trial in this case owe their existence to then-Chief Judge Walker's assurance to Proponents that the recordings were being made not for the purpose of broadcasting the trial, but solely for his use in chambers. Not only was this assurance necessary to comply with Local Rule 77-3, which prohibits dissemination of trial proceedings beyond "the confines of the courthouse," it came on the heels of an emergency Supreme Court decision specifically enforcing Rule 77-3 against Chief Judge Walker. Proponents understood Chief Judge Walker's assurance to exclude the possibility that he would later broadcast, or enable the broadcast, of the trial recording. He subsequently confirmed this understanding when he emphasized that the refusal of several of Proponents' expert witnesses to testify at trial could not reasonably have been motivated by a concern about "the potential for public broadcast" of the trial recordings because that potential "had been eliminated." Ex. 35 at 35-36. Proponents took Chief Judge Walker at his word, as did two of Proponents' expert witnesses in deciding to testify even though the proceedings would be recorded.

Former judge Walker makes no reference to any of this in defending as "permissible and appropriate" his public use of "the actual cross-examination excerpt from *Perry*." Letter from Vaughn R. Walker 1 (Apr. 14, 2001).

Appellees, for their part, trumpet this course of events as *virtuous*. "There

was no reason," Appellees say, "to keep the video of this trial under the cover of darkness in the first place." Pls.-Appellees' Opp'n to Appellants' Mot. Regarding Trial Recordings and Pls.'-Appellants' Motion to Unseal ("Opp.") 3. Worse, they ask this Court to join them in ignoring Local Rule 77-3, Judicial Council policy, then-Chief Judge Walker's commitment, and the Supreme Court's stay decision, and to unseal and release the trial recordings into the public domain. And *this*, they say, will "*promote*[] public confidence in the *integrity and impartiality* of the judiciary." Opp. 7 (emphasis added).

1. Appellees assert that former judge Walker has not "violated any rule or directive with respect to the video in question." Opp. 6. But Appellees do not deny that the Supreme Court's stay decision, Judicial Council policy, and Local Rule 77-3 prohibit the public dissemination of trial proceedings beyond the confines of the courthouse. Rather, they advance several specious arguments to avoid those clear prohibitions.

a. Appellees contend that Judge Walker's public dissemination of a portion of the trial recording did not "violate the Supreme Court's ruling" because that ruling "was explicitly limited to the live streaming of court proceedings to other federal courthouses." Opp. 8 (quotation marks omitted). But that was all that the order then under review authorized. *See Hollingsworth*, 130 S. Ct. at 709. Importantly, the Supreme Court's *reasoning* was not limited to live

streaming, but rather made clear that the duly enacted and binding version of Local Rule 77-3 prohibited (as it still prohibits) *all* public dissemination of trial proceedings beyond the confines of the courthouse. *See id*. at 707, 711.

The Media Coalition contributes the argument that the Supreme Court's stay decision addressed only "contemporaneous broadcast" of the trial proceedings, not their subsequent public dissemination. Joinder of Non-Party Media Coalition in Pls.-Appellees' Mot. to Unseal ("Media Br.") 2 (emphasis omitted). On the contrary, Local Rule 77-3's prohibition applies regardless of *when* the public dissemination occurs. As the Supreme Court recognized, Local Rule 77-3 "prohibited" (as it still prohibits) not only "the taking of photographs, public broadcasting or televising" of trial proceedings, but also "recording for those purposes." Ex. 6, *quoted in Hollingsworth*, 130 S. Ct. at 710-11; *id*. at 708 (local rule "banned the recording or broadcast of court proceedings"). The obvious import of this prohibition against recording is to prevent *subsequent* public dissemination. *See KFMB-TV Channel 8 v. Municipal Ct.*, 221 Cal. App. 3d 1362, 1367-68 (1990) (restriction on "recording for broadcasting" covers "preserving for later broadcasting"). Nor is there any reason for the rule to treat contemporaneous and subsequent dissemination differently. Indeed, whether the broadcast occurs live or on tape delay, the concerns about broadcasting trial proceedings that motivated the Supreme Court's stay decision, the policies of the Judicial

Conference and the Judicial Council, and Local Rule 77-3 are the same: it "can intimidate litigants, witnesses, and jurors, … create privacy concerns for many individuals involved in the trial, … become a potent negotiating tactic, … encourage some participants … [to] grandstand[]," Ex. 3 at 2, and "cause judges to avoid unpopular decisions or positions," Ex. 36 at 16.

b. Appellees suggest that "Chief Judge Walker did not violate the district court's Local Rule 77-3" because that rule "prohibits recording trial proceedings with the *intent* to publicly broadcast," whereas his initial intention was to "use [the recordings] 'in connection with preparing the findings.'" Opp. 8 (emphasis added); *see also* Media Br. 3-4 ("the Judicial Council Policy and former Local Rule 77-3 do not apply here because they only preclude recording for *the purpose of* public broadcasting or television – not what occurred here"). But regardless of whether the act of recording a particular trial itself is contrary to Local Rule 77-3 or Council policy, the public dissemination of trial recordings clearly runs afoul of the distinct "prohibit[ion against] the streaming of transmissions, or other broadcasting or televising, beyond 'the confines of the courthouse.'" *Hollingsworth*, 130 S. Ct. at 711 (quoting Local Rule 77-3); *see also id.* at 707.[1]

[1] If the legality of public dissemination of trial recordings depended upon the judge's initially intended use for the recordings, trial judges would have nearly unfettered power to publicly disseminate trial recordings, and the Council's policy

2. Appellees, assisted by the Media Coalition, attempt to relitigate in this Court their claim that the First Amendment mandates public access to the recordings of the trial proceedings in this case. *See* Opp. 2-4, 9-10; S.F. Opp. 5-7. But regardless of the qualified right, if any, that the First Amendment might guarantee the public to access civil trial proceedings,[2] the Supreme Court, in staying the broadcast order in this case, has already rejected Appellees' argument that the First Amendment affords the public the right to access the *recordings* or *broadcast* of the trial proceedings in this case. *See* Ex. 34 at 18-19. Indeed, Appellees' argument is, in effect, a claim that Local Rule 77-3, the policies of this Court's Judicial Council and the Judicial Conference, and the Supreme Court's decision enforcing them in this case all violated the First Amendment.[3]

It does not matter that the recordings are now part of the record of the case. *See* Opp. 4-5. The public's qualified common-law right to access trial records, *see* Opp. 10; *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1102 (9th Cir. 1999), has no purchase here because the recordings could lawfully have been

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and Local Rule 77-3 would effectively be nullified, for appellate courts would likely find it difficult and unseemly to ascertain whether the initial intention of a judge who subsequently "changed his mind" was pretextual or disingenuous.

[2] As the precedents cited by Appellees and former judge Walker show, the Supreme Court and this Court have found only that the First Amendment guarantees the public access to *criminal* proceedings.

[3] Moreover, as Appellees admit, the public has already had full access to the public trial in this case and continues to have access to the trial transcript. *See, e.g.*, Opp. 3, 5.

created in the first place only on condition that they not be publicly disseminated outside the courthouse. The Supreme Court's stay decision, Council policy, and Local Rule 77-3, not to mention then-Chief Judge Walker's on-the-record assurance to Proponents, cannot be nullified by the expedient of recording trial proceedings under the promise that the video would be used "simply … in chambers," Ex. 1 at 754:24-755:4, and then placing the recordings in the trial record.

3. Appellees also seek to relitigate the question whether public dissemination of the trial recordings outside the courthouse would cause harm – again advancing arguments rejected by the Supreme Court. They assert that "Proponents failed to submit *any* evidence in the trial court to support their witness intimidation claims." Opp. 5; *see also id*. at 9; S.F. Opp. 1-5. In its decision staying the broadcast order, however, the Supreme Court emphasized that "[s]ome of [Proponents'] witnesses have already said that they will not testify if the trial is broadcast, and they have substantiated their concerns by citing incidents of past harassment." *Hollingsworth*, 130 S. Ct. at 713.[4] Indeed, the expert witness whose testimony is excerpted in former judge Walker's speech made his decision to go

[4] Appellees' counsel are well aware of this record of past harassment of Proposition 8 supporters; indeed, shortly before the Supreme Court stayed the broadcast here, Plaintiffs-Appellees' lead counsel relied on it in another case then pending before the Supreme Court. *See Hollingsworth*, 130 S. Ct. at 707 (citing Reply Brief for Appellant 28-29 in *Citizens United v. Federal Election Comm'n*, No. 08-205).

forward with his testimony in reliance on then-Chief Judge Walker's assurance to Proponents that the recordings would be used solely in his chambers.

And although trial is now over, *see* Opp. 5, the harm that could result from witness intimidation is not. As the Supreme Court recognized, public dissemination of the trial recordings could have a chilling effect on even expert witnesses' willingness "to cooperate in any future proceedings," which could cause "irreparable harm." *Hollingsworth*, 130 S. Ct. at 712-13. Indeed, releasing the trial recordings in this case would magnify the harm foreseen by the Supreme Court exponentially, for witnesses in future controversial cases over "issues subject to intense debate," *id*. at 714, would think long and hard before accepting a federal judge's assurance that video recordings of the trial would be solely for his use in chambers.

4. Appellees, remarkably, find it significant that Proponents "never appealed the district court's decision to record the trial or objected to Plaintiffs' use of the trial video in closing arguments." Opp. 8-9. Again, Proponents did object to the recording of the trial proceedings, *see* Appellants' Mot. for Order Compelling Return of Trial Recordings ("Mot.") 6-8, but when then-Chief Judge Walker assured them on the record that the recordings would be "simply for [his] use in chambers," Ex. 1 at 754:15-755:4, Proponents took him at his word. And although Chief Judge Walker, *sua sponte*, provided copies of the trial recordings to

Appellees for their use in closing arguments, they were required, both before and after closing argument, to keep the recordings strictly confidential. *See* Mot. 10-11. In sum, at no point between the Supreme Court's stay of the broadcast order and former judge Walker's recent public use of the trial recordings in speeches and lectures were the recordings used, or purportedly authorized to be used, publicly outside the courthouse. Consequently, Proponents' decision not to object to these earlier actions could not possibly constitute a waiver of their present objection to the public dissemination of the trial recordings beyond the confines of the courthouse as being in clear violation of the seal order, the Supreme Court's stay decision, Judicial Council and Judicial Conference policy, and Local Rule 77-3.

5. Appellees ask in the alternative that they be allowed to retain their copies of the trial recordings. Opp. 10-11. But now that the trial is over and the appeal has been briefed and argued to this Court, there is no reason to anticipate that Appellees will need access to the trial recordings again. Indeed, San Francisco confesses that "[n]o party currently seeks to use the video footage." S.F. Opp. 1.

6. Finally, Appellees argue that the district court should resolve these issues in the first instance. Opp. 6-7. But the record of this case is now before this Court, which has inherent supervisory power over it. Mot. 18-19. Appellees dismiss this point on the ground that "Proponents' motion does not, in any way, affect the record," Opp. 6 – a meritless contention given that the recordings, as

Appellees emphasize, are part of the record and that the issue pending before this Court is whether (on Proponents' motion) to enforce the seal and order the return of the trial recordings or (on Appellees' motion) to lift the seal and release the recordings into the public domain. Further, the district court would likely lack jurisdiction. *See In re Marino*, 234 B.R. 767, 769 (9th Cir. 1999) ("trial court may not interfere with the appeal process or with the jurisdiction of the appellate court"). And because Proponents' and Appellees' motions present pure questions of law, remanding this dispute to the district court for initial consideration would be inefficient.

CONCLUSION

For the foregoing reasons and the reasons stated in our opening brief, the Court should order that former judge Walker cease further disclosures of the trial recordings in this case, or any portion thereof, and that all copies of the trial recordings in the possession, custody, or control of any party to this case or former judge Walker be returned promptly to the Court and held by the court clerk under seal. The Court should also deny Appellees' motion to unseal the trial recordings.

April 21, 2011

Respectfully submitted,

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9th Circuit Case Number(s) 10-16696

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